IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1625

ARLEN REALTY AND DEVELOPMENT CORPORATION, a corporation, and ATLANTIC DEPARTMENT STORES, INC., a corporation,

Petitioners,

vs.

CONDOR CORPORATION, a Minnesota corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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SUBJECT INDEX

CITATIONS

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on February 10, 1976.

Opinions Below

The opinion of the Court of Appeals below (Appendix, infra, p. A-1) is not yet reported. It affirmed the judgment of the District Court, District of Minnesota, Third Division in favor of respondent and there is no opinion of that court.

Jurisdiction

The judgment of the Court of Appeals below (Appendix, infra, p. A-1) was entered on February 10, 1976. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Whether the Court of Appeals, in a mitigation of damages defense to Respondent-Landlord's action for rents, applied an erroneous standard of determining whether efforts by a landlord to relet were reasonable by reviewing only the efforts of Respondent without regard to the established standard of whether a hypothetical reasonably prudent landlord would have acted

differently under the circumstances.

Whether the Court of Appeals' allowance of interest on a rent claim was in conflict with applicable state law where the total liability for rent was in question through the defense of mitigation of damages.

STATUTES AND LAW INVOLVED

This is a diversity action based on 28 U.S.C. § 1332. The district court applied the Minnesota Common Law regarding Landlord and Tenant relation.

STATEMENT OF CASE

This diversity of citizenship action arises from a breach of the lease of an 80,000 square foot commercial building in St. Paul, Minnesota by Petitioners and their refusal to pay rent. Respondent brought this action to collect rents and other sums under the lease. Respondent reentered and exercised control over the

premises. There is no dispute that Respondent by its actions assumed a duty to mitigate damages.

The lower court record indicates that Respondent's efforts to relet the premises, while possibly reasonable in light of Respondent's lack of experience in rental of large commercial space, and ineptness in negotiating with potential commercial tenants, were clearly not the efforts a reasonable landlord would have taken under the same circumstances. Respondent, although totally lacking in the necessary skill or experience to lease large commercial buildings, failed to seek the necessary professional assistance. Respondent relied on contacts with its small and equally inexperienced circle of friends.

Respondent failed to quote parameters available for the lease of the property

although nearly five years remained under Petitioners' lease and Respondent was thereby in a position to offer very generous lease terms to prospective tenants. Respondent was in a position to offer lease terms to prospective tenants well under the going price for similar space in the market, because the standard of mitigation was the reletting at the best price available. Prospective tenants were never given any concrete parameters from which to negotiate.

In addition, Respondent did not properly follow up on the few leads it did receive. Prospective tenants were not informed of the situation surrounding the availability of the premises, or of the possibility of very advantageous lease terms that were available because of Petitioners' liability for rent without the right to possession. Even in the one situation where Respondent quoted a lease term

of $4.50 a square foot (Petitioners' liability was for $1.50 a square foot), Respondent failed to clearly indicate to the prospective tenant that the $4.50 figure included Respondent making substantial and expensive leasehold improvements. The tenant's representative testified that he had interpreted the $4.50 figure not to include the leasehold improvements.

In summary, Respondent's efforts to relet the premises exhibited a total lack of experience and skill in negotiating leases of large commercial space.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because it applied an improper standard by reviewing Respondent's efforts to relet only in light of Respondent's experience, without regard to what a reasonable landlord would have done under

similar circumstances. A landlord in Respondent's position is required to use all reasonable efforts to relet the premises for the benefit of the tenant. The standard is that of the reasonable man, in this case a landlord, under the same or similar circumstances. Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966). See also, Annot. 115 A.L.R. 206 (1938). Respondent, by retaking control of the premises, assumed this duty to mitigate damages. Gruman v. Investors Diversified Services, Inc., 247 Minn. 502, 78 N.W.2d 377 (1956). The Court of Appeals applied the wrong standard in failing to review the record in light of whether Respondent's actions were those a reasonable landlord would have taken.

The decision of the Court of Appeals also should be reviewed on the allowance of interest on Respondent's rent claim.

Minnesota common law is clear that an award of interest is not proper where the claim on which the interest is based depends on any contingency. Moosbrugger v. McGraw-Edison Company, 284 Minn. 143, 170 N.W.2d 72, 82 (1969). The ultimate consideration is whether the defendant is able to calculate the amount he owes before judgment is entered, or whether the plaintiff's claim is subject to a contingency making it impossible for defendant to calculate the amount due on plaintiff's claim.

In the present situation, the existence of Respondent's duty to mitigate damages made it impossible for Petitioners to determine, before judgment, the exact amount, if any, owed to Respondent. Employer's Liability Assurance Corp. v. Morse, 261 Minn. 395, 111 N.W.2d 620, 626 (1961), states this principle succinctly:

> . . . It was impossible for defendant to know how much he must pay until the jury had assessed the damage. Where the amount of liability has not been ascertained, there is no liability for interest thereon prior to the time of its ascertainment.

The amount of Arlen and Atlantic's liability for rent was not ascertainable until a determination was made as to whether or to what extent Condor had fulfilled its duty to mitigate.

Potter v. Hartzell Propeller, Inc., 291 Minn. 513, 189 N.W.2d 499, 504 (1971), sets forth the theory behind the disallowance of interest:

> . . . The underlying principle is that one who cannot ascertain the amount of damages for which he might be held liable cannot be expected to tender payment and thereby stop the running of interest.

The Court of Appeals, in its decision awarding interest, relied on Spurck v. Civil Service Board, 231 Minn. 183, 42

N.W.2d 720 (1950). That case involved the amount due under an employment contract subject to a set off for wages earned by the employee subsequent to his unlawful layoff. This case is not applicable to the present case since Petitioners' total liability to pay any of the amounts claimed to be due was in question. A mere set off is substantially different than a defense of lack of liability. The entire amount due was contingent on Respondent proving it had used reasonable efforts to mitigate. Carpenter v. Wisniewski, supra at 883. Until this burden was met, there was no liability on Petitioners to pay rent.

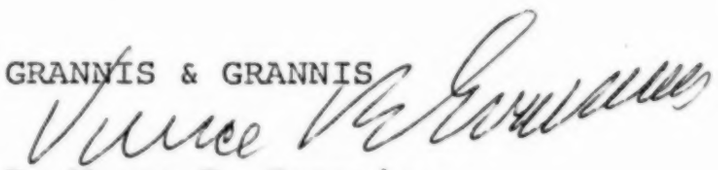
The questions presented by this case are of great and recurring significance in the area of landlord mitigation of damages and pre-judgment interest on unliquidated claims. If the new standard of mitigation

applied by the Court of Appeals is allowed to stand, inept and inexperienced landlords having assumed a duty to mitigate damages, and thereby effectively restricting tenants from finding replacements, will stumble along contacting ineffectively their small circle of friends as prospective tenants and totally denying tenants their right to the efforts of a reasonable landlord in mitigating damages.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GRANNIS & GRANNIS



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CERTIFICATE OF SERVICE

I, Vance B. Grannis, one of the attorneys for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6 th day of April, 1976, I served three copies of the foregoing Petition For Writ of Certiorari together with three copies of the Appendix in this cause, upon the Resondent by depositing same in the United States Mail, postage prepaid, and addressed to Respondent's attorneys of record Frank J. Walz and James A. Rubenstein, Thirty-eighth Floor, IDS Tower, 80 South Eighth Street, Minneapolis, Minnesota 55402.

VANCE B. GRANNIS

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1512

Condor Corporation,
a Minnesota corporation,

Appellee,

v.

Arlen Realty and Development
Corporation, a corporation,
and Atlantic Department Stores,
Inc., a corporation,

Appellants.

Appeal from the United
States District Court
for the District of
Minnesota

Submitted: January 12, 1976

Filed: February 10, 1976

Before LAY, STEPHENSON and WEBSTER,
Circuit Judges.

PER CURIAM.

This appeal in a diversity case involving a landlord's claim for rent due from the tenants following their abandonment of leased premises raises three issues: (1) Whether the trial court applied the proper standard in determining that the landlord breached its duty to mitigate damages; (2) whether there was sufficient evidence to support the court's determination that the landlord discharged its duty to use reasonable efforts to mitigate the damages caused by the tenants' breach of the lease; (3) whether the court erred in awarding prejudgment interest on the unpaid rents. We affirm.

Appellee landlord brought this action against appellants (lessee and sublessee) for rent due and other items, utility

charges, etc., allegedly due on account of appellants' abandonment of the premises and resultant breach of the lease. The case was tried to the court[1] sitting without a jury. After trial on the merits, the court ordered judgment in favor of appellee against appellants in the sum of $99,900.00 and costs.

In this appeal appellants do not contest the amounts due under the lease other than by way of their claim for set-off on account of the landlord's alleged failure to fulfill its duty to use reasonable efforts to mitigate demages. Specifically, appellants claim that the proper standard to be applied in determining whether the landlord breached its duty to mitigate damages is that of a

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[1]The Honorable Edward J. Devitt, Chief Judge, District of Minnesota, presiding.

reasonable landlord under the same or similar circumstances, whereas the court applied the test of whether appellee used reasonable efforts, without regard to whether a reasonable landlord would have acted differently. We find appellants' contention devoid of merit.

The trial court properly concluded that appellee by retaking possession had a duty to use reasonable efforts to mitigate the damages caused by appellants' breach of the lease, Gruman v. Investors Diversified Services, 78 N.W.2d 377 (Minn. 1956); further, that the question of whether appellee fulfilled its duty of reasonable efforts is to be determined from all of the facts and circumstances of the case, including the terms of the lease, the nature of the property involved, and the nature and extent of appellee's efforts to find a tenant or

tenants. Carpenter v. Wisniewski, 215 N.E.2d 882 (Ind. App. 1966); Dushoff v. Phoenix Co., 528 P.2d 637(Ariz. App.1974).

The trial court made detailed findings with respect to appellee's efforts to mitigate its damages. No useful purpose would be set out by repeating them here. Suffice to say we are abundantly satisfied that the court's findings are not clearly erroneous. The court's conclusion that appellee discharged its duty to use reasonable efforts to mitigate damages is amply supported by the record.

The trial court awarded appellee $2,114.20 in prejudgment interest on the unpaid rents. Appellants allege that under Minnesota law where the claim is unliquidated, prejudgment interest may only be awarded if the claim is ascertainable by computation and the claim does

not depend upon any contingency, citing Moosbrugger v. McGraw-Edison Co., 170 N.W. 2d 72, 82 (1969). Here, since appellee had a duty to mitigate damages, appellants allege they had no way of ascertaining the amount they owed prior to judgment.

Appellee argues that its claim was a sum certain and the fact that it was subject to appellants' defenses does not affect appellee's right to prejudgment interest. The Supreme Court of Minnesota in Spurck v. Civil Service Board, 42 N.W. 2d 720, 728 (Minn. 1950), held that where the amount due under a contract is certain but is or may be reduced by an unliquidated setoff, interest is allowable on the balance found to be due from the time it became due under the contract. See also Bang v. International Sisal Co., 4 N.W.2d 113 (Minn. 1942). It is our view that

these cases control and the allowance of interest was proper.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT